Farm Fresh, Inc. *and* United Food and Commercial Workers Union, Local 400, AFL–CIO. Cases 5–CA–17940, 5–CA–18407, 5–CA–18721, 5–CA–18912, 5–CA–18951, 5–CA–19147, 5–CA–19303, and 5–CA–19469

December 19, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On May 17, 1991, Administrative Law Judge David L. Evans issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find no merit in the Respondent's exception that the unlawful interrogation of two employees by Assistant Store Manager Williams in the snackbar of its Denbigh store was effectively repudiated under the standards articulated in *Passavant Memorial Hospital*, 237 NLRB 138 (1978). In this regard, the Respondent notes that immediately following the interrogation, and in the presence of union organizer Terry Dixon and the employees with whom Dixon was meeting, Store Manager Mingee told Williams that Dixon had the right to talk to the employees. We find this attempted cure by Mingee ineffective under *Passavant* because it did not refer to or acknowledge the unlawful interrogation by Williams and did not occur in an atmosphere free of other unfair labor practices. Indeed, shortly after the alleged repudiation by Mingee of Williams' unlawful interrogation, Mingee unlawfully ordered Dixon out of the snackbar.

[2] With respect to the allegation concerning a threat to close, we note that Respondent did not provide an objective factual basis for its assertions that the selection of the Union would necessarily mean higher wages, that higher wages would lead to the closure of departments and that the closure of departments would lead to the closure of stores. See *Crown Cork & Seal*, 255 NLRB 14 (1981).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Farm Fresh, Inc., Norfolk and Richmond, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. On February 27, 1991, by Decision and Order of that date,[1] the Board remanded this proceeding to me for the purposes of making and entering findings of fact, conclusions of law, and recommended Order on certain matters that had been the subject of a settlement agreement that had been set aside by order of the Regional Director.

1. The complaint alleges that Respondent, on March 15, 1986,[2] at the Arrowhead Shopping Center store in Virginia Beach, by Store Manager David Harmon, threatened employees with store closure if the Union were successful in organizing Respondent's employees and threatened employees with discharge if they engaged in union activities in violation of Section 8(a)(1) of the Act. In support of these allegations, the General Counsel called current employee Sharon Prentice. Prentice testified that Harmon called a meeting of ''twenty or more'' employees and told them:

> The Union would hurt you more than help you. If the Union ever got in, the store would close. And if you ever have a problem, the Union would take a week to six, nine months before you'd ever get an answer. You'll never move up in the world unless someone dies or quits. The Union would hurt Farm Fresh more than help. . . . If they catch anyone at a Union meeting, or talking to Union guys, they would be automatically terminated.

Harmon denied any such threats. In giving this testimony, Prentice evinced a distance and vacuousness that caused me to suspect her credibility as she testified. Additionally, none of the other ''twenty or more'' employees were called to substantiate these threats, the blatancy of which eclipses any other threats in this extensive case. Although I would not make a credibility resolution against a witness solely because she stood alone against others, I cannot credit a witness such as Prentice without other substantiation.

Accordingly, I shall recommend dismissal of all the allegations based on the above testimony by Prentice.

[1] 301 NLRB 907.

[2] All dates are in 1986, unless otherwise indicated.

2. The complaint alleges that Harmon, on March 21, at the Arrowhead store, threatened employees, interrogated employees, and confiscated union literature from employees. The General Counsel also called Prentice in support of these allegations. Prentice testified that while she was in the snackbar, she was approached by Harmon and Assistant Manager Hope Faller. At the time, Prentice was reading a union pamphlet. According to Prentice, Harmon asked Prentice for the pamphlet and asked her what she thought about the Union. Prentice told Harmon that she favored the Union, and gave him the pamphlet. Prentice, after substantial leading, also testified that, in the same incident, Harmon said, ''What was said at the meeting'' previously described.

Harmon and Faller, both of whom had a more favorable demeanor than Prentice,[3] credibly denied this testimony, and I shall recommend dismissal of the allegations based on it.

3. The complaint alleges that Respondent, at its Broad Street store in Richmond, on March 15, by Assistant Store Manager Jon Credit, ordered a union organizer to leave the store on threat of arrest, confiscated or attempted to confiscate union literature from employees and union organizers, and threatened employees with discharge for engaging in union activities in violation of Section 8(a)(1).

In support of this allegation, the General Counsel relies on the testimony of organizer Paul Evans Sr. Evans testified that while one of the unprotected ''blitzes''[4] of the store was going on, he was in the snackbar talking to employees who were on their breaks. At one point, all the employees left, except one. Evans gave that employee a union authorization card when she asked for one. Then an unidentified man who had been sitting in the snackbar approached, reached around Evans and grabbed the card, and tore it up. The man also ''told her if she wanted to keep her job she shouldn't fill that card out.'' The man also demanded that Evans turn over to him any other cards that the employees had signed. Evans refused to give the cards to him.

Credit testified that the store manager was not present when the blitz of March 15 happened, and that he was in charge of the store. Credit credibly denied that he even went into the snackbar during the blitz. However, Credit also testified that he assigned Glen Jenson, frozen food and dairy manager, to follow some of the union organizers around the store while he watched others. Jenson was not called to testify.

Although the complaint does not name Jenson, it is not denied that someone acting with apparent authority to order people about confronted Evans in the snackbar. Since Credit, acting on behalf of Respondent, testified that he ordered Jenson to follow the union representatives around, it is logical to conclude, as I do, that it was Jenson who confronted Evans and the employee in the snackbar. Jenson, while acting on Credit's orders, was doing so on behalf of Respondent. In so doing, Jenson acted as an agent of Respondent within Section 2(13) of the Act.

Since Jenson was not called by Respondent, and no reason for not doing so was advanced, Evans' testimony about what happened in the snackbar is not denied. Accordingly, I find and conclude that the allegations based on Evans' testimony have been proved.

4. The complaint alleges that Respondent, on March 17, at its Williamsburg Road store in Richmond, by Night Manager Steve Schultz, unlawfully ejected a union representative from the store. The General Counsel called Evans in support of this allegation, also. Evans testified that someone, acting as the manager, threatened to call the police, and did call the police, in order to get him ejected. When first approached by said person, Evans was conducting himself as a customer in the snackbar.

Shultz admitted asking Evans to leave, and he admitted calling the police. However, Shultz credibly testified that he did so only after he and some employees found union literature strewn about the premises (including at least one nonpublic area) and after he had gotten reports that a union representative was in the store, and had been in the parking lot, talking to employees who were on duty. Shultz, who no longer works for Respondent and had no apparent reason to lie for Respondent, was credible in this testimony.

Evans denied having engaged in such ''blitz'' tactics; however, it is clear that someone had, immediately before Shultz approached Evans. Shultz was not required to catch Evans, or others, in the act. Respondent had a right to get the likely perpetrators of the ''blitz'' out of its store, and this is all that Shultz did.

I shall recommend dismissal of this allegation of the complaint.

5. The complaint alleges that Respondent, on March 19, at its Victory Boulevard store in Portsmouth, by Assistant Store Manager Gary Newell, unlawfully ordered union representatives to leave its premises. The General Counsel relies on certain testimony by Union Representative Charles Garbers as proof of this allegation.

Garbers testified that he and another union representative were ordered to leave the store and the parking lot in front of the store after they handed union literature to employees who were working in both places. Newell admits that he did exactly that. On brief, the General Counsel does not contend that this action by Newell constituted a violation of the Act. Garbers additionally testified that he and the other union representative then moved to a portion of the (large) parking lot that lay in front of other stores in the shopping center. The General Counsel states on brief, page 63, that Garbers was in that adjacent portion of the lot when Newell ordered him to leave that area also, or Newell would call the police. Garbers testified to no such thing. To the extent Garbers' testimony can be read to infer that he was threatened with arrest by Newell when he was in a portion of the lot other than that immediately in front of Respondent's store, I find it inadequate to prove the point.

Accordingly, I shall recommend dismissal of this allegation of the complaint.

6. The complaint alleges that Respondent, in violation of Section 8(a)(1), on March 20, at its Poquoson store, by Supervisor Benjamin Bernales, threatened union representatives with arrest if they did not leave Respondent's parking lot. Union Representative Terry Dixon testified that Bernales so threatened him at a time when he and Union Representative

[3] Faller was no longer employed by Respondent and had no apparent reason to lie on its behalf.

[4] As described in the original ALJD, the''blitzes'' consisted of union representatives entering the stores in groups, leaving union literature on shelves, public and nonpublic areas, and, ultimately, the floors, and soliciting working employees, as well as nonworking employees, in an effort to get them to join the Union.

Tommy Robinson were in the parking lot attempting to talk to off-duty employees.

Bernales did not testify. Respondent called Supervisor Brian Shipley who testified that he was present when there was some sort of exchange between Bernales and Dixon, but he did not hear what was said.

There is no reason to discredit Dixon, and I find his testimony to be the fact. Accordingly, I find and conclude that this allegation of the complaint has been proved.

7. The complaint alleges that on March 21, Harmon unlawfully threatened union representatives with arrest unless they vacated Respondent's premises at the Arrowhead Shopping Center store. For this allegation the General Counsel relies on testimony by Garbers who, on cross-examination, essentially admitted that he and other union representatives had blitzed the store that day. Garbers testified that when the store manager told him to leave, he did so. He went to an ice cream store in the same shopping center. As he was coming out of that store, he saw a crowd gathered around a policeman who had arrived at the parking lot in front of the store. According to Garbers,

> The officer stated that the management of the company in that particular store did not want us on the premises or the parking lot or we would be subject to arrest.

Garbers left. He has not returned. He was asked on direct examination why he had not returned, and he replied, ''The officer said we were subject to arrest if we were seen in or around there.''

This testimony is not denied.

The complaint further alleges that union representatives were unlawfully denied access to Respondent's West Mercury store in Hampton on April 3. Union Organizer Gary Gatewood testified that when he and Union Representative Bob Wigglesworth had blitzed the store on that date, they was asked to leave, and they did. They stayed outside for a while, then decided to go back in for a cup of coffee. The store manager called the police. A police officer arrived, and talked to the union representatives separately, outside the store. The officer told the union representatives that Respondent's management did not want them in the store, or the shopping center, again, and if they came back and Respondent's management called him, he would arrest the union representatives.

The General Counsel does not contend that barring the union representatives from the store for the day was a violation in view of the union representatives' ''transgressions.'' (Br. 68.) However, the General Counsel contends that the officers' permanent injunction against their coming back to the store, and the shopping centers, constituted a violation of Section 8(a)(1) of the Act on the part of Respondent.

The officers' instruction to the union representatives was outside the hearing of any supervisor so, if it had been beyond anything any supervisor had asked the officers to state, none of Respondent's agents had any chance to repudiate it. Moreover, there is no evidence that any agent of Respondent sponsored, or ever came to know of, the broad instructions that were issued by the officers. In these circumstances, I find and conclude that there is no basis for assessing liability on Respondent because of the actions of the officers.

Accordingly, I shall recommend that these allegations of the complaint be dismissed.

8. The complaint alleges that on April 6, at the West Mercury Boulevard store in Hampton, Respondent, by Store Manager Edward Sheedy, caused union representatives to be removed from the premises on threat of arrest by police, at a time when the union representatives were engaged in lawful activity, in violation of Section 8(a)(1).

The West Mercury Boulevard store is a very large one, and it is situated in a shopping center that is entirely owned by Respondent.

Union Representatives Terry Dixon and Tommy Robinson went to the store on April 6. They spoke to employees in the parking lot, as discussed infra; there is no probative evidence that any of those employees were on duty at the time Dixon and Robinson spoke to them.

Dixon and Robinson left the portion of the parking lot that was immediately in front of the store and went to a drive-in restaurant that was in the same parking lot, but about 100 yards away. They purchased some food and were eating it in the parking area immediately in front of the restaurant when they were approached by Respondent's store manager, Sheedy.

There is a great deal of conflict about what happened then; however, Sheedy admits that he went back to the store where he met a police officer. Sheedy admits that he asked the officer to get the union representatives to leave the premises. The officer approached Dixon and Robinson and ordered them to leave, which they did.

Sheedy testified that it had been reported to him that Dixon and Robinson had been soliciting working employees when they were in that portion of the parking lot that lay before Respondent's store. This hearsay is not sufficient to prove the fact, and I must conclude that, at all times, the union representatives had been acting lawfully when they were in the area closer to Respondent's store. Certainly they were acting lawfully when Sheedy got the police officer to order them away from the restaurant area that was quite distant from any working employee of Respondent.

Accordingly, I find and conclude that the allegation has been proved.

9. The complaint alleges that on August 30, agents of Respondent unlawfully threatened a union representative with arrest and removal from its Denbigh store in Newport News and, also on that date, Respondent's agent Eric Williams interrogated an employee at the store, all in violation of Section 8(a)(1).

Union Representative Dixon testified that, on August 30, as he was eating at the snackbar at the store, ''I noticed some employees sitting at a table so I walked over to them, identified myself and asked them to take some Union literature, which they did.'' Dixon sat down at their table and began talking to the two employees. Then Assistant Store Manager Williams came over, without being asked, and sat down. Williams ''asked the employees what they were doing,'' but they did not respond, according to Dixon. Dixon told Williams that he was acting unlawfully, and Williams said that he was just trying to be friendly. At that point, Store Manager Gerald Mingee arrived and told Williams that Dixon had a right to be talking to the employees in the snackbar, and Mingee told Williams to go to the front of the store, which Williams did. Dixon bought some food and

began to eat it. Just as Dixon finished eating his food, Mingee told Dixon to leave. Dixon saw another employee come to the ''hot line'' for food service, and started to get up to approach that employee. Mingee blocked Dixon's egress from the booth, and told Dixon that he was going to call the police if Dixon did not leave. Dixon left.

Mingee and Williams were called by Respondent. Mingee testified that he addressed Dixon in the snackbar on August 30; Mingee did not remember if Williams or anyone else was with him. Mingee testified that Dixon had been in the snackbar for about 1 hour and 10 minutes, but he did not testify about how he knew that. Mingee testified that he approached Dixon and told him: ''I think it's time that you leave.'' On cross-examination Mingee twice denied telling Dixon that he would call the police. He did not, on direct examination or cross-examination, claim that Dixon said anything about the police.

Williams testified that Dixon had been in the snackbar for about 45 minutes when he and Mingee approached Dixon. Williams testified that he had gone along with Mingee as a witness. According to Williams, Mingee told Dixon that Mingee considered Dixon to be loitering. Williams testified that Dixon ''said that he wasn't leaving the store and that we would have to call the police to kick him out.''

Mingee and Williams testified that Dixon ignored Mingee; they (or Mingee by himself, according to Mingee) turned and left the snackbar to Dixon.

Mingee and Williams did not get their stories straight; Mingee took the tactic of resting with a flat denial; Williams took the tactic of claiming that Dixon was the one who brought up the police. I credit Dixon. If Dixon had mentioned the police first, or if Dixon had mentioned the police at all, Mingee would have assuredly have testified to the fact, especially after being challenged by the General Counsel on cross-examination about his alleged reference to the police. Moreover, I agree with the General Counsel's argument on brief that it is incredible that, after challenging Dixon, with or without the reference to police, Mingee and Williams backed down and walked away.

Although Dixon admitted (unprotected) ''table hopping,'' Mingee and Williams did not claim that this was why they approached Dixon. Mingee ordered Dixon out because he felt that Dixon had stayed too long. Mingee admitted that Dixon had bought food; at best, Dixon was given the ''bum's rush'' immediately after he took his last swallow. That is, Dixon was still conducting himself generally as a customer when he was ordered to leave; Respondent had no right to so order Dixon, and by Mingee's doing so, Respondent violated Section 8(a)(1) of the Act.

I further credit Dixon's testimony that, when he sat down at the table with Dixon and two employees, Williams asked the employees what they were doing. Williams had known Dixon for several years; the only point in asking the employees what they were doing with Dixon was to convey to the employees that Respondent disapproved of what they were doing, talking to the union representative. Therefore, whether couched in terms of a threat or an interrogation, Williams' remark was necessarily coercive and violative of Section 8(a)(1) of the Act.

Accordingly, I find and conclude that these allegations of the complaint have been proved.

10. The complaint alleges that Respondent, on March 25, by Manager Terrence Farrar, at its Jefferson Davis Highway store in Richmond, conducted photographic surveillance of union representatives as they were attempting to talk to employees in Respondent's parking lot in violation of Section 8(a)(1).

Union Representative Ermaun Joe testified that in March he went to the store to walk around to see who the employees were. As he left the store, Farrar followed him. According to Joe, ''And so I went out on the parking lot. And then he had this Polaroid camera in his hand and he commenced to flash pictures at me.'' Joe testified that Farrar took pictures of Joe and other union representatives who were in the parking lot, including one who was talking to an employee who had gotten off work. Joe testified that Farrar took six or eight pictures, including some that he took by snapping the camera ''in my face.''

Joe acknowledged that his pretrial affidavit states that at one point, ''He [Farrar] then asked me if he could take our pictures with the Polaroid camera he had with him. I told him that he could, and he did so.''

Farrar testified that he approached the group of union representatives in the parking lot, and:

> [T]he large guy [apparently Joe] says, ''how would you like to have a group picture?''; and I said, ''Okay.'' So I took a couple of shots; and I guess that irritated them and they started verbally abusing me, telling me they were going to kick my fanny and talking about my mother, and this, that and the other. And I asked [a nearby clerk who had followed Farrar as Farrar had followed Joe] to go in and get Kyle Bevins, my meat manager.

Farrar testified that Bevins came out to the parking lot, and as Farrar turned to speak to Bevins, one of the union representatives grabbed at his hand which held the two Polaroid pictures that he had taken. This caused the camera to strike Farrar in the groin area, causing momentary pain. After that, according to Farrar ''I took several more pictures.'' As he did so, the union representatives cursed and threatened him. Then, Farrar took several pictures of the union representatives because ''I was irritated.''

At trial Farrar attempted to convey the impression that he had the camera at the ready only because he had been taking pictures of a display, for a company contest, when he first saw Joe in the store. He is belied by his pretrial affidavit which states that he had the camera at hand because another store owner had called and said that union representatives might be on the way to the store. His affidavit also states that he was going to take a picture of the display, but it is obvious that he could have put the camera down at some point. I find that Farrar intended to do exactly what he did—follow Joe into the parking lot and take pictures of Joe and any other union representatives that may have been there.

A camera is a well-recognized tool of surveillance. Any employee who saw Farrar follow Joe out of the store and into the parking lot would know that there was no legitimate reason for Farrar's action. Just having the camera there, and certainly the taking of several pictures, would necessarily have had a coercive impact on any employee who may have witnessed the scene. Assuming, as Farrar testified, the group

of union representatives initially responded to him by asking him to take a group picture, the response was clearly an exercise in sarcasm, and it could not have licensed Farrar to bring the camera to that point in the first place.[5]

Accordingly I find and conclude that this allegation of the complaint has been proved.[6]

11. The complaint alleges that in March, at the Williamsburg Road store in Richmond, by Kathy Austin, Respondent threatened employees with discharge in violation of Section 8(a)(1).

For this allegation the General Counsel relies on the testimony of Austin, the supervisor involved, not any employee. Austin testified that she told another employee not to talk about the Union in the store because, based on her experience at another employer's place of business, the employee could be fired.

Austin made it clear that she told the employee that she was only telling the employee what Austin's prior employer had done and that she was only speculating that Respondent might do the same. Austin also made it clear that the employee was a friend, and she spoke only as a friend. The issue, however, is the impact on the employee. Even though couched in terms of what had happened elsewhere, and even though offered as the advice of a friend, a supervisors' telling an employee not to engage in union activities because discharge could result necessarily would interfere with that employees' Section 7 rights. Accordingly, I find and conclude that the allegation has been proved.

12. The complaint alleges that on March 21, at the Williamsburg Road store in Richmond, Respondent, by Assistant Store Manager Johnny Johnson, interrogated an employee in violation of Section 8(a)(1) of the Act.

Former employee Wendy Porch testified that, as she was working at a cash register, she was stopped and called aside by Johnson who escorted her to a display area. At that point, Johnson asked Porch if she had been telling employees that he was ''two-faced.'' Porch replied that she had. Johnson then asked her if she was interested in the Union. Porch, falsely, replied that she was not. Johnson was called by Respondent and denied ever speaking to Porch about the Union, but I found Porch completely credible.

Porch had not displayed her feelings openly, she did not initiate the exchange with Johnson, and Johnson preceded his question about Porch's union sympathies with a question that was guaranteed to make Porch, at least, uncomfortable. Under the circumstances, the coercive element is clear, and I find and conclude that the allegation has been proved.

13. The complaint alleges that on March 18 Respondent, by its president and chief executive officer, Gene Walters, at the North Military Highway store in Norfolk, ''threatened its employees with department or store closure if the Union were successful in organizing,'' in violation of Section 8(a)(1).

Former bakery department supervisor Sylvia Redman testified that she was present when Walters came to the store and addressed all supervisors and employees. Redman testified that in his speech, Walters used a union publication that listed 10 reasons why an employee should sign a union authorization card. Walters gave a reply to each of the listed reasons. At ''Job Security,'' according to Redman, Walters said:

> As far as job security, he did mention that if the Union was voted in that they would have to pay more wages; more wages had to [be] paid or some of the departments would have to close down; if the departments closed down, then the stores would have to close down. [Semicolons added.]

On cross-examination Redman was asked and testified:

> Q. You remember him saying that Big Star and Kroger's had closed, didn't [sic] you?
>
> A. Yes.
>
> Q. And . . . did he say that part of the reason was because their costs were too high?
>
> A. Me said that they closed because the Union came in and they had to pay too much in wages.

Respondent called two witnesses to rebut this testimony, neither of whom was Walters. Sean McKimens was the store manager at the time. After leading, he testified that Walters did not threaten in any way to close the store if the Union was successful in the organizational attempt. McKimens did acknowledge that Walters told the gathered employees that the store had been losing money and that it was being kept open only for sentimental reasons. Bonnie Nielson testified that she could not remember if Walters said anything about the store closing.

The reason for Respondent's presenting Nielson is not clear because she appeared to be at trial for no reason other than to state that she remembered essentially nothing about Walters' speech. The clearly biased testimony of Manager McKimens essentially admitted a threat as McKimens acknowledged that, in Walters' antiunion speech, Walters stated that the store was being kept open only for sentimental reasons.

Contrary to the assertion of Respondent on brief, the questioning of Redman on brief was not, in the least, leading. Respondent not having advanced any other reason for discrediting Redman, and my having found Redman to have been completely credible in her demeanor, I find that the testimony of Redman to have been the fact.

Accordingly, I find and concluded that the allegation has been proved.

14. The complaint alleges, and Respondent admits, that from about March 1 until April 25, Respondent maintained in its employee handbook a rule that states:

> No one other than Farm Fresh advertising employees or their designated representatives may solicit or distribute literature in shopping or service areas. Any soliciting on company property should be reported to the manager in charge immediately.

Respondent does not dispute the General Counsel's contention that, on its face, this rule violates Section 8(a)(1) of the Act. The complaint further alleges that the rule was enforced until April 25, in violation of Section 8(a)(1); Respondent denies that allegation.

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[5] I do not believe Farrar's quoted testimony that the union representatives became abusive because he had taken a second shot; I believe that they, including Joe, became abrasive only after Farrar had taken many shots.

[6] *Blanchard Construction Co.*, 234 NLRB 1035 (1978); *Barnes Hospital*, 217 NLRB 725 (1975).

The complaint alleges that the quoted rule was enforced on April 8 at the Merrimack Trail store in Williamsburg.

Former employee Robert Linderman testified that, on April 8, he was scheduled to begin working (as a bagger) at noon. He arrived at the store about 11:45 a.m. Linderman went to the snackbar and bought a cup of coffee. Me distributed literature to several employees who were there on breaks. Nonfoods Manager Alex Rotter came into the snackbar and asked what he was doing. Linderman told Rotter that he was distributing literature for the Union and explaining the organizational attempt to employees. Linderman offered some union literature to Rotter who took it and left. Linderman heard a page for Store Manager Howard to go to the snackbar, and shortly afterward, Howard and Assistant Store Manager Stemann came to the snackbar and sat in the booth immediately behind Linderman's booth. Howard left the area at some point, and Linderman and Stemann had an exchange. According to Linderman:

> I turned around and said ''hello'' to Bob Stemann, asked him how he was doing, and then I told him that I was passing out Union literature, and I was supporting the campaign of Local 400.
>
> Mr. Stemann then told me, he said, ''I wish you hadn't said that.'' There are signs up on the door that say ''No Solicitation.'' And I said ''Bob, if you're telling me to stop, I'll stop.'' And he says, ''I'm asking you to stop.'' I said, okay, that's fine. I gathered my Union materials, went out, took them and put them in my car; locked them away. I called Don Dickerson, of Local 400, and asked him to file charges on my behalf.

In his testimony, Stemann did not deny Linderman's account of this exchange. He added, however, that Rotter had reported to him that Linderman had given him literature while he was working in an aisle. At one point Stemann testified that he went to the snackbar because of Rotter's report; at another point, Stemann testified that he went to the snackbar because the employees there were being noisy and waiving the union literature around.

For good measure, Stemann testified that he purchased a cup of coffee, and that Linderman had purchased nothing. Linderman had been coached; he knew that he was supposed to act like a customer, and he did so, at least to the extent of purchasing something. I discredit Stemann on that point, as I discredit his conflicting accounts of coming to the snackbar for purposes of noise control and for some reason related to the (totally unsubstantiated) report of a working-area solicitation of Rotter by Linderman. That is, I find and conclude that Stemann went to the snackbar to do exactly what he did, stop Linderman from solicitation of nonworking employees in the snackbar, an action that violated Section 8(a)(1) of the Act.

On April 25, Linderman was off duty in the evening when he went to the parking lot to solicit employees who were going to, or leaving, work. He was ordered to leave by an assistant manager. Respondent's brief states, ''The April 25 parking lot incident concededly was inappropriate; however, it was immediately and effectively disavowed by Farm Fresh, and no remedy is necessary.''[7] The disavowal that Respondent refers to occurred on April 28. On that date, Jim Cox, Respondent's personnel manager, met with Linderman in Howard's office. Cox told Linderman that Linderman had a right to solicit nonworking employees in the parking lot and the snackbar, and other nonworking areas, as long as Linderman was not on working time, as well. On the same day, Respondent posted nonviolative no-distribution, no-solicitation rules, but there was no express repudiation of the above-quoted rule. In view of that fact, and the fact that Respondent had committed, and continued to commit, other unfair labor practices, Cox's reassurance to one employee, Linderman, and the posting of a nonviolative rule, did not constitute an effective repudiation of the maintenance and enforcement of Respondent's violative rules. The allegations have been proved.

15. The complaint alleges that Respondent, on December 4 and 14, at its East Mercury Boulevard store in Hampton, and its Jefferson Avenue store in Newport News, respectively, by Randy Crocker and Kevin Mattison, respectively, confiscated union literature from employees.

Union Representative Dixon testified that on December 4 he went to the Hampton store about 9:30 a.m. He purchased a cup of coffee and, as employees on break sat down at other tables, he got up, went over to their tables, and gave them literature. Dixon testified that Crocker went to one of the tables and asked the employees for the literature, and they gave it to him.

Dixon testified that he went to the Newport News store's snackbar during the evening of December 14 and purchased coffee. Dixon flagged down an employee who passed by and gave him a union authorization card. Then Mattison, who had been eating pizza nearby, ''got up and got the card back from the employee.'' Mattison and Crocker denied this alleged conduct.

I found Dixon and Crocker and Mattison equally credible on their testimony. Because the General Counsel has the burden of persuasion, these allegations have not been proved.

REMEDY

Having found that the Respondent has engaged in certain additional unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Farm Fresh, Inc., Norfolk and Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening arrest of any union representative who is lawfully conducting himself on Respondent's premises; confiscating, or attempt to confiscate, union literature that is in the possession of union representatives or its employees; engaging in photographic surveillance of employees or union representatives who are lawfully conducting themselves; interrogating employees about their union activities, member-

[7] Br. 85.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ships, or desires; threatening department closure, or store closure, if the employees choose the Union as their collective-bargaining representative; or maintaining or enforcing rules that prohibit employees from engaging in distributions of literature or solicitations that are protected by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Norfolk and Richmond, Virginia area stores copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten the arrest of any representative of United Food and Commercial Workers Union, Local 400, AFL–CIO, who is lawfully conducting himself on our premises.

WE WILL NOT confiscate, or attempt to confiscate, union literature that is in the possession of union representatives or our employees.

WE WILL NOT engage in photographic surveillance of union representatives, or our employees, who are lawfully conducting themselves.

WE WILL NOT interrogate our employees about their union activities, memberships, or desires.

WE WILL NOT threaten department closure, or store closure, if our employees choose the Union as their collective-bargaining representative.

WE WILL NOT maintain or enforce rules that prohibit employees from engaging in distributions of literature or solicitations that are protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

FARM FRESH, INC.